MOTION FILED
MAR 31 1989

No. 88-1427

IN THE

Supreme Court of the United States

October Term, 1988

INTERNATIONAL ASSOCIATION OF MACHINISTS, AND AEROSPACE WORKERS, *et al.*,

Petitioners

v.

FRANK MEAGHER,

Respondent

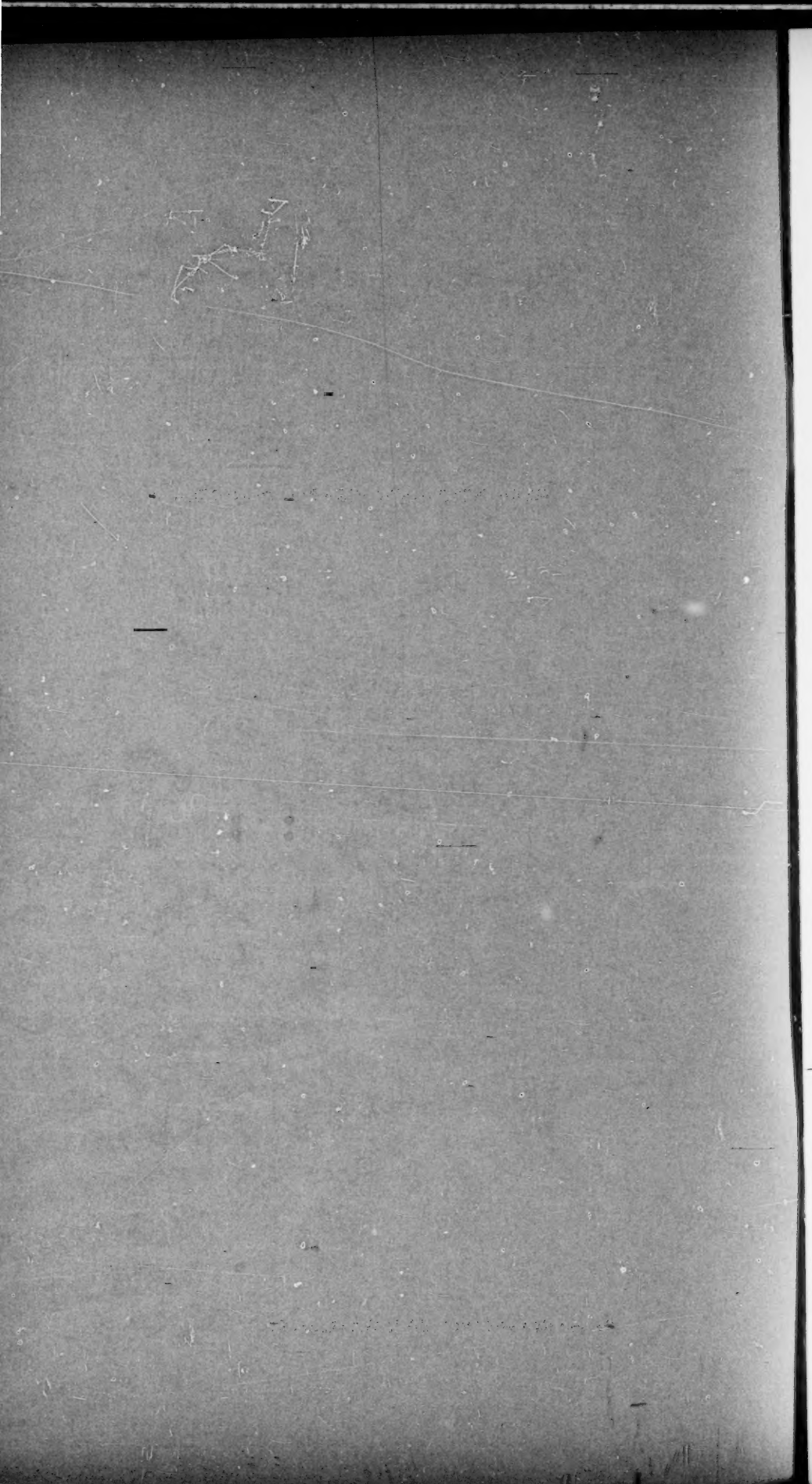
ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF THE AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

Gary D. Simms, Esq.
1720 I St. N.W., 7th Fl.
Washington, D.C. 20006
(202) 223-8196

Attorney for American Academy of Actuaries as Amicus Curiae

CASILLAS PRESS, INC., 1717 K STREET, N.W., WASHINGTON D.C. 20036



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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF OF THE AMERICAN ACADEMY OF ACTUARIES IN SUPPORT OF PETITIONERS

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, the American Academy of Actuaries ("the Academy") hereby moves the Court for leave to file the accompanying brief as Amicus Curiae in support of the Petition for Writ of Certiorari filed on March 1, 1989 in No. 88-1427.

In support of the motion, the Academy states as follows:

1. The motion is necessitated by the failure of Respondent ank Meagher, upon request, to give consent to the filing a brief by the Academy. Petitioner International Associa- n of Machinists and Aerospace Workers, et al., has con- nted to the filing of the accompanying brief.

2. The American Academy of Actuaries is a non-profit ganization whose membership consists of approximately 000 actuaries across the United States. The Academy has one of its major functions the providing of advice and counsel public policy decision makers and to the courts on issues here actuarial issues are raised.

3. The Academy is an interested party because it is con- erned that the decision of the Ninth Circuit below may have erious adverse effects on defined benefit pension plans roughout the country and upon the ability of actuaries to per- rm their statutory duties effectively. The Academy therefore oves for leave to file the attached brief to assist the Court's onsideration of the actuarial dimension of the issue presented.

4. The Academy is uniquely situated to provide information nd analysis regarding the actuarial implications of this case. HEREFORE, the Academy respectfully requests leave to e the accompanying brief as amicus curiae.

Respectfully submitted,

Gary D. Simms, Esq.
1720 I St. N.W., 7th Floor
Washington, D.C. 20006

ated: March 30, 1989

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Motion of the American Academy of Actuaries for Leave to File an Amicus Curiae Brief in Support of Petitioners was served by first class mail, postage prepaid, this _____ day of March, 1989, to the following parties of record:

Thomas J. Hart
(Counsel of Record)
Thomas Hart and Associates
Suite 402
1625 Massachusetts Ave., N.W.
Washington, D.C. 20036

Marc Greenberg, Esq.
(Counsel of Record)
Law Offices of Marc Greenberg
Suite 201 487 3rd St.
San Francisco, CA 94197

TABLE OF CONTENTS

Page

STATEMENT OF INTEREST OF AMICUS CURIAE 1

STATEMENT OF THE ISSUE 3

STATEMENT OF THE CASE 3

ARGUMENT 5

CONCLUSION 11

TABLE OF AUTHORITIES

Cases: Page

Shaw v. IAM Pension Plan, 563 F. Supp. 653 (C.D. CA 1983), *affirmed*, 750 F.2d 1458 (9th Cir., 1985), *cert. denied*, 471 U.S. 1137 (1985) 4

Statutes:

Sections of the Employee Retirement Income Security Act (ERISA) as amended:

Section 103(a)(4) 2

Section 303 2

Section 413 3

Section 3042 2

Regulations and Misc.

29 C.F.R. 2606 10

Proposed Regulation 29 C.F.R. 2616.1 (52 F.R. 3318, September 2, 1987) 10

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BRIEF OF THE AMERICAN ACADEMY OF ACTUARIES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

The American Academy of Actuaries submits this brief, amicus curiae, pursuant to Rule 36.1 of the Rules of the Supreme Court of the United States, in support of Petitioners in No. 88-1427.

I. STATEMENT OF INTEREST OF AMICUS CURIAE

The American Academy of Actuaries (the "Academy") is a national professional organization of actuaries which was

formed in 1965 to bring into one organization actuaries of all specialties within the United States, and to seek accreditation and greater public recognition for the profession. Its main focus is the social, economic, and public policy environment in which the actuarial profession functions. Primary activities include liaison with federal and state governments, relations with other professions, the dissemination of public information about the profession and issues that affect it, and the development of standards of professional conduct and practice.

In order to join the Academy, prospective members must satisfy rigorous education and experience requirements. The current membership is approximately 9,000. The Academy estimates that almost 90% of those who could join have joined the Academy.

Actuaries are an indispensable element in the functioning of pension plans, particularly in areas of plan design, administration, and financing. Actuaries must satisfy regulatory requirements propounded by the Joint Board for the Enrollment of Actuaries, pursuant to Section 3042 of the Employee Retirement Income Security Act ("ERISA") in order to engage in practice pursuant to that statute (to become "enrolled actuaries.") More than 85% of all enrolled actuaries are represented within the Academy's membership.

Enrolled actuaries are authorized to make annual certifications required by Section 103(a)(4) of ERISA, and, most importantly for the instant matter, to certify the minimum funding level of defined benefit pension plans under Section 303 of ERISA.

The Academy is deeply concerned about the effect of the Ninth Circuit's decision below on defined benefit plans, upon the pension system as a whole, and upon the actuarial profession's ability to undertake its responsibilities under law.

Because of the importance of clarifying the role of actuaries in future pension plan administration, the Academy respectfully prays that the petition for certiorari filed by the International Association of Machinists ("IAM" herein) be granted.

II. STATEMENT OF THE ISSUE

Whether the Ninth Circuit erred in creating a "continuing violation theory" of ERISA's statute of limitations (29 U.S.C. Section 1113)[1] under which a plaintiff's limitations period begins running each time an allegedly inadequate benefit check is issued.

III. STATEMENT OF THE CASE

Frank Meagher, respondent herein, was an officer of the International Association of Machinists and Aerospace Workers ("IAM") for 20 and one-half years prior to his retirement on

[1]The statute (Section 413 of ERISA) states as follows:

> (a) No action may be commenced under this title with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of-
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date (A) on which the plaintiff had actual knowledge of the breach or violation, or (B) on which a report from which he could have reasonably been expected to have obtained knowledge of such breach or violation was filed with the Secretary under this title;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

July 1, 1977. The IAM, as an employer, sponsored a defined benefit pension plan, in which Meagher was fully vested prior to his retirement. One feature of the plan was a so-called "living pension" feature which provided retirement benefit increases proportional to those provided to the position from which he had retired.

In September, 1976, the trustees acted to amend the plan and phase out the "living pension" feature. In February, 1979, soon after the plan's trustees commenced the phase out, a letter was sent to all retirees explaining the phase-out. A Summary Plan Description was distributed in October 1979 which again described the phase-out of the benefit.

On December 1, 1981, a plan participant, Edward Shaw, filed a class action claiming that the phase-out was illegal. The district court agreed with the claim. *Shaw v. IAM Pension Plan,* 563 F. Supp. 653 (C.D. CA 1983), which was affirmed by the Ninth Circuit in *Shaw v. IAM Pension Plan,* 750 F.2d 1458 (9th Cir., 1985), *cert. denied,* 471 U.S. 1137 (1985), finding that the "living pension" feature was a part of the accrued benefit which could not be decreased without the approval of the Secretary of the Treasury, which had not been therein obtained.

Meagher initiated the instant action on May 13, 1986. The district court granted the defendants' motion for summary judgment, finding that the action was barred by the applicable statute of limitations under ERISA 29 U.S.C. Section 1113. The Ninth Circuit reversed, and Petitioners have sought review by this Court.

IV. ARGUMENT

A. Review by the Supreme Court is Needed to Resolve Ambiguity in the Application of the Statute of Limitations.

As long as a question remains regarding the applicability of the statute of limitations, actuaries will be faced with needless and unnecessary uncertainty. The function of the enrolled actuary of a pension plan under ERISA is to provide appropriate estimates of annual funding requirements, based on a careful analysis of existing liabilities, plan investment return, and future trends in salaries, retirement, marriage, morbidity and mortality. To the extent that existing liabilities cannot be ascertained with a degree of certainty, these calculations become less reliable. In the absence of a clear understanding regarding the operation of a statute of limitations, actuaries will lack assurance that possible errors committed more than three years (or six years, if appropriate) before can be safely and appropriately ignored. As a result, the analysis of liabilities and funding requirements will become less certain. The Supreme Court should therefore review the case and articulate a bright line when a right to initiate an action accrues, and when that right is extinguished.

The decision below results in what can be appropriately denominated as a "rolling" statute of limitations. For purposes of certainty, the statute of limitations needs to be identified as commencing when an error or omission takes place giving rise to a cause of action (or when the claimant receives notice of that error or omission), and not from the time when the consequence of that error or omission arises or becomes apparent to the potential claimant. To find otherwise would result in endless ambiguity regarding the applicability of the statute of limitations, and invite considerable litigation growing out of

situations where a claimant is aware of grounds for a claim, but chooses to sit back and wait to determine whether ensuing developments might increase the odds for success.[2]

In a related area, actuaries, although not plan fiduciaries, nevertheless can be subjected to suit for alleged malpractice. Such threats to the personal liability of actuaries are also faced by other pension professionals, including attorneys, accountants, plan administrators and trustees. At present, it is very difficult for such professionals to obtain appropriate professional liability insurance, due in large part to the lack of certainty which is inherent in their undertakings. Extension of the statute of limitations increases the potential period of claims (creates a "long tail") for which insurers are even more hesitant to provide coverage. The lack of insurance coverage can have the effect of forcing the pension professional to act in a more conservative manner than the facts and circumstances of the assignment might dictate.

B. The Supreme Court Should Review the Case To Preserve the Effect and Function of the Statute of Limitations

One purpose of a statute of limitations is to allocate responsibility between parties for finding and eliminating errors which may arise in the functioning of a dynamic system such as pen-

[2]Hypothetically speaking, the claimant in this case could have had actual notice of the attempted plan amendment eliminating the "living pension" feature of the plan when the attempted amendment was made. By delaying a claim, he would have failed to place the trustees on notice of their error, and the trustees would not have seen the need for seeking the Secretary's approval for their action. By delaying the claim, the claimant would in such an instance have enhanced his eventual recovery by failing to raise the claim in a timely manner, an action precisely at odds with the theory of a statute of limitations.

sion plans. As in all dynamic systems, errors can take place which affect benefit levels of participants. In a system such as the modern American defined benefit pension system with the almost annual legislative changes and continuing complex regulatory promulgations, such errors are not infrequent.

Plan participants and beneficiaries receive annual reports on plan decisions and on their own benefits. In view of the burden-sharing intention of the statute of limitations, it is submitted that at least some of the burden should be placed on participants to promptly bring to the attention of plan sponsors and administrators errors which may have arisen. Promptness in bringing such matters to the attention of those with funding decision responsibilities is needed to assure appropriate funding determinations.[3]

It is fundamental to actuarial science that stability is necessary in funding pension plans. The statute of limitations provides a time limit upon which to base calculations and estimates. Elimination of the statute of limitations is detrimental to orderly plan funding. Many errors made by plans are relatively small; however, if recovery is not "cut off" by a statute of limitations, relatively small errors can grow to significant amounts over time, through the accumulation of erroneous payments and the compounding of interest on those payments. It is therefore not in the interest of a stable pension system to permit uncertainty regarding the statute of limitations.

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[3]It should be noted that the statute of limitations can also serve to protect the interests of plan beneficiaries. For example, if a plan erroneously overpays a beneficiary as a result of administrative error, the plan is constrained by the statute of limitations to limit its recovery to the three year period denominated by the statute, as measured from the time of the error.

C. Uncertainty Regarding the Statute of Limitations Could have a Negative Effect on Retirement Income Security.

Uncertainty regarding the statute of limitations can have an immediate and negative impact on retirement income security by reducing the level of plan funding. In the plan at issue here, funding levels were prescribed by the constitution of the employing union[4] and hence could not be quickly changed as is the case with many employer-provided pension plans. In fact, in most collectively bargained plans, contribution levels are fixed for the length of the agreement period.

In the case at hand, plan funding levels were established based on the belief that the plan amendment eliminating the "living pension" feature had been effective. When subsequent litigation established that the amendment was ineffective for benefits accruing after January 1, 1977, the plan's funding level was suddenly discovered to be much lower than had been assumed. Because there is a finite amount of money available through contributions to pay for benefits, when a benefit which the trustees had assumed to be eliminated is suddenly reimposed, the plan's funding level becomes inadequate. The statute of limitations is particularly appropriate in this kind of situation because a failure by the Respondent to put the trustees on timely notice exacerbated plan underfunding for many years.

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[4]The 1977 Constitution of the employer stated as follows in Article XIV, Section 9:

> ...After December 31, 1976, the contributions shall be 30% of the salaries of all of the persons employed in all of the positions covered by this Plan..."

Increased uncertainty resulting from an uncertain statute of limitations increases the need for the actuary to utilize appropriate safety margins for adverse experience. When such margins are increased due to greater uncertainty, beneficiaries are likely to receive smaller benefits than they would otherwise receive.

Uncertainty regarding the statute of limitations could also lead to an increase in lump sum cash outs when pensions become payable. At the present time, benefits from defined benefit plans are most frequently distributed as lifetime annuities to the beneficiary (and frequently to a surviving spouse as well). Plan sponsors would wish to limit their potential liability for errors arising during the lengthy period of annuity distributions over the lifetime of beneficiaries.

As a result, they would seek to provide immediate lump sum cash payments, thereby eliminating the lengthy period of time within which an error might grow. The use of lump sum settlements is contrary to appropriate pension policy, because it transfers to the beneficiary the investment risk and management responsibilities, and undercuts the goal of assured pension income throughout the lifetime of the beneficiary. In addition, lump sum payouts at retirement, although they cannot be mandated by the employer, can be encouraged through financial incentives. But retirees in such cases generally forego future benefits increases, in any, and often lose entitlement to retiree health benefits as well, when such benefits are tied to pension benefits.

D. Existing and Proposed Regulations Support the Theory of a Precise and Well-Articulated Statute of Limitations

The concept of a well-articulated and precise period within which claims need to be raised is not limited to Section 413

of ERISA. In light of the dynamic nature of pension plans, several other regulatory time frames have been adopted within which claims must be brought to the attention of plan sponsors or waived administratively. For example, the Pension Benefit Guaranty Corporation regulations appear in 29 C.F.R. 2606.5 and .33 provide a time limit within which to challenge benefit determinations.

In addition, the proposed regulations governing so-called "standard terminations" (52 F.R. 3318, September 2, 1987) discuss the requirement for notice of benefit commitment at the time of plan termination. Such notice is required to participants in pay status, or who have received benefits for less than one year.[5] As the preamble states, notice to employees who have received benefits for a year or more is not necessary, because they already had sufficient notice and time within which to contest the level of benefits they receive. To the extent that such a notice period is sufficient in that context, it is submitted that the longer statute of limitations of ERISA (three years) provides sufficient time, and needs no further extension by judicial interpretation.

[5]The preamble to proposed regulation Section 2616.1 states in part as follows:

> With respect to benefits of participants (or beneficiaries) in pay status as of the proposed termination date, Section 2617.14(d) requires that the personal data be provided only to participants (or beneficiaries) who were in pay status as of that date. Requiring that this information be provided to all persons in pay status could create a tremendous administrative burden in many plans. Moreover, it seems unlikely that, after one year, there would be outstanding questions as to a persons' correct benefit. (emphasis added).

V. CONCLUSION

Based upon the foregoing, it is respectfully requested that this honorable Court issue a a writ of certiorari to the Ninth Circuit Court of Appeals and affirm the request of Petitioners.

Gary D. Simms
Attorney for Amicus
American Academy of Actuaries
1720 I. St. N.W.
Washington, D.C. 20006
(202) 223-8196